IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0437

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MELVIN MATSON,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Fifth Judicial District Court,
Jefferson County, The Honorable Loren Tucker, Presiding

APPEARANCES:

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Appellant Matson respectfully submits this reply to Appellee's brief.

In its Statement of Facts, the State asserts that as a result of the thefts from Gruber Excavating and the theft of diesel fuel from a separate business, Gruber asked for increased patrol of his business properties. (Appellee's Br. at 3, citing 4/15/09 Tr. at 14-15.) However, Gruber asked for increased patrol of his three business properties due to two recent crimes committed at his other two locations. These crimes were a busted door to the office, and stolen scrap metal. Gruber never asked for increased patrolling due to diesel fuel being stolen from a business that was not owned by him. (4/15/09 Tr. at 37-44.)

The State asserts "All of the thefts in the area that Detective Gleich had investigated involved people and vehicles from outside of Jefferson County." (Appellee's Br. at 3, citing 4/15/09 Tr. at 15.) However, a review of the testimony clarifies only one crime had been resolved, and the resolved crime involved people from Butte (license plate leader "1"). (4/15/09 Tr. at 19.)

The State cited several cases to support its argument that Det. Gleich had particularized suspicion to stop Matson for an investigative stop. (Appellee's Br. at 9-12, citing *State v. Gopher*, 193 Mont. 189, 631 P.2d 293 (1981); *State v. Flemings*, 2008 MT 229, 344 Mont. 360, 188 P.3d 1020; *State v. McMaster*, 2008 MT 294, 345 Mont. 408, 191 P.3d 443; and *State v. Hilgendorf*, 2009 MT 158, 350 Mont 412, 208 P.3d 401.) However, each case cited by the State may be clearly

distinguished and supports Matson's assertion that Det. Gleich lacked particularized suspicion.

Gopher is nothing like this case. (Appellee's Br. at 9.) In *Gopher*, a silent alarm was triggered and upon arriving about a minute later, the officer noticed a broken store window, two large rocks on the floor, empty spaces in the rifle rack and fresh tire tracks leaving the parking lot. *Gopher*, 193 Mont. at 190-91, 631 P.2d at 294. Further, the officer had over 12 years of experience with the Great Falls police department. Here, although Det. Gleich had a total of 10 years of experience, nothing else resembles the fact scenario in *Gopher*. Here, we do not have a broken window, nothing appeared stolen or damaged on the Gruber property. When Det. Gleich approached the yard, Matson was at the entrance of the yard (after making a u-turn) preparing to leave, when Gleich *signaled* him to pull out. Matson obeyed.

While addressing *Gopher* the State asserts, "To establish particularized suspicion, police officers can rely on their knowledge of the patterns of law breakers." (Appellee's Br. at 9.) However, the State cites no authority for this assertion and the Court should therefore disregard. Mont. R. App. P. 12(f). *Gopher* supports the proposition that experience of the officer can aid in a determination of particularized suspicion (*Gopher*, 193 Mont. at 193-94, 631 P.2d

at 295-96), however, "knowledge of the patterns of law breakers" does not equate to experience of the law enforcement officer.

In *Flemings*, this Court held particularized suspicion existed where a burglary had recently occurred on the remote mountain road the defendant was traveling on, the officers expected the burglar to return, and no other people were in the area. (Appellee's Br. at 9-10.) Similar to *Gopher*, in *Flemings* there was a secret alarm (motion-sensitive camera) activated which notified the police something was amiss. *Flemings*, ¶¶ 4-5. Here, no secret alarm was triggered, no shed door was closed and locked. In fact, Matson was in a parking lot that was open to the public because signs were posted advertising materials for sale and the post and wire gate was left open. *Flemings* is not dispositive.

In citing *McMaster*, the State attempts to draw an analogy with the case at hand. (Appellee's Br. at 10-11.) The State failed in its attempt. In *McMaster*, the gas station was a place where drug deals were known to occur. Three individuals acted suspiciously as they exited their vehicle and looked over their shoulders while walking into the adjacent casino. Upon leaving the casino a box was exchanged. The individuals drove away from the casino in two vehicles. The officer following the defendant discovered the car was registered to him and recognized him as a known drug dealer. The officer also observed the defendant driving erratically on the highway for several miles. Here, Matson was located on

a property open to the public (no posted signs indicating "no trespassing" and the gate left open). After receiving Matson's vehicle registration information from dispatch, Det. Gleich knew the vehicle was not stolen, and he did not recognize Matson as a known criminal. Matson did not repeatedly look at Det. Gleich, but only "appeared nervous" after Det. Gleich signaled him to leave the Gruber property and had difficulty engaging his truck into gear. A classic clutch situation. As stated in Matson's opening brief, "many law-abiding citizens may well be nervous when their activities are being watched by law enforcement officers." *State v. Broken Rope*, 278 Mont. 427, 432, 925 P.2d 1157, 1160 (1996).

Again, in *Hilgendorf*, the State attempts to draw an analogy with this case. (Appellee's Br. at 11-12.) However, in *Hilgendorf* a vehicle with its engine running was parked next to a closed business at 2:00 a.m. After circling the block, the officer pulled behind the vehicle and the vehicle drove quickly away. The passengers then moved around inside the vehicle as if trying to conceal something. Here, Matson was preparing to leave the Gruber property (which was open to the public) when he was *signaled* by Det. Gleich to leave. It was not two in the morning but 7:25 p.m. on a summer evening (the sun still in the Montana sky). Matson did not drive quickly away, but after signaled by Det. Gleich his truck lurched because he had difficulty engaging the clutch. Matson did not make evasive moves inside his vehicle because he was not trying to hide something.

Hilgendorf does not resemble the case at hand. There is no objective data available for Det. Gleich to have formed particularized suspicion in this case.

In contrast to the State's assertion that "it was apparent the yard was closed[,]" the gate at the business yard was left wide open, a large sign advertised for materials for sale, and no posted signs warned the public to stay off the property. (Appellee's Br. at 12; 4/15/09 Tr. at 22, 24, 31, 42-44.)

The State would like this Court to believe Det. Gleich's knowledge about the yard was objective and was information of the kind and type to be learned by living in the community. (Appellee's Br. at 13-14.) Matson strenuously disagrees with this assertion. Would a police officer who did not conduct personal business with Gruber Excavating have knowledge of *all* the license plates *and* employees at a particular business (such as the local hardware store, restaurants, gas stations, lumber yards)? No. An officer might see the same cars regularly located in a specific parking lot, but not necessarily be concerned if other cars appear in the same lot at other times. A police officer may know that general business hours are 8 a.m. to 5 p.m., but that a construction-based company may have longer hours of operation, especially during the summer months. (Further, a restaurant, definitely open to the public, was located directly across the street from Gruber's Excavating. It was possible that cars from the restaurant would enter the Gruber property for u-turns in order to find parking.)

Even conceding, for the sake of argument only, that Det. Gleich's subjective knowledge provided him more information than the reasonable officer, his knowledge did not rise to the level of particularized suspicion. On a "sunshiny" day where the sun had not yet set, Det. Gleich saw a cloud of dust; he viewed a car he didn't recognize with an out-of-county license plate; on a property with a wide-open gate that was open to the public.

In its response, the State tries to distinguish Matson's use of *State v. Jarman*, 1998 MT 277, 291 Mont. 391, 967 P.2d 1009, as support for no particularized suspicion. (Appellee's Br. at 14-15.) The State argues Matson was on private property (versus Jarman's use of a public pay phone), however, the gate to prohibit access to the property was left wide open, a sign located on the property advertised construction materials for sale, and no signs were posted informing the public "no trespassing." The State incorrectly asserts that several previous crimes in the area were committed by people outside of Jefferson County. However, when questioned by the district court which counties were involved Det. Gleich admitted that only one crime had been resolved and the alleged perpetrator came from Butte (*not* Gallatin County). (4/15/09 Tr. at 19.) Lastly, Det. Gleich noted Matson's difficulty operating the clutch of his truck. Matson's clutch was slipping and

needed repair.[1] If this Court determines that people driving vehicles needing a clutch replacement provides particularized suspicion for an investigative stop, the Court has lost its common sense. Ultimately, the State conceded that other than the jerking vehicle, there were not any other problems with Matson's driving. (Appellee's Br. at 6.) A lurching vehicle does not particularized suspicion make.

Det. Gleich's speculation does not rise to the level of particularized suspicion and this Court should reverse the district court's denial of Matson's motion to suppress as there was no particularized suspicion to support an investigative stop.

Respectfully submitted this 26th day of April, 2010.

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[1] *See* 4/15/09 Tr. at 28-29. Matson's vehicle was a 2003 Chevrolet truck. (D.C. Doc. 1 at Citation # C51A19426.) The average number of miles driven annually for light trucks up to 10 years old is 15,000 miles per year. (http://www.epa.gov/oms/climate/420f05004.htm, last visited April 19, 2010.) The average life for a clutch is about 90,000 miles. (http://classic.artsautomotive.com/clutchstory.htm, last visited April 19, 2010.)

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing reply brief of Appellant to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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